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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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OF THE STATE OF TEXAS

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EX PARTE BRANDON JOSEPH ADAMS

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On Appeal from the Court of Appeals
Eleventh Judicial District, Eastland, Texas
Cause Number 11-17-00332-CR
42nd District Court of Taylor County, Texas
Honorable James Eidson, Judge Presiding
Trial Court Cause Number 26,815-A

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STATE'S BRIEF ON THE MERITS

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PD-0711-18

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EX PARTE BRANDON JOSEPH ADAMS

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IN THE TEXAS COURT OF CRIMINAL APPEALS

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through her Assistant Criminal District Attorney, Britt Lindsey, and submits this Brief on the Merits pursuant to Tex. R. App. Proc. 70.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF PROCEDURAL HISTORY

Appellant was indicted on June 2, 2016 on two charges of aggravated assault with a deadly weapon in cause numbers 26,815-A and 26,816-A, both alleged to have occurred on or about October 18, 2015.

(CR: 18) Appellant was acquitted following a jury trial in cause number 26,816-A on September 19, 2017. (RR3: 289)

On November 3, 2017 Appellant filed a pretrial writ of habeas corpus, arguing the acquittal in 26,816-A barred the State from pursuing a conviction in 26,815-A. (CR1: 59-63) (RR2: 6) The trial court heard argument and denied the application at a hearing held on November 27, 2017. (RR2: 6) Appellant proceeded to trial in cause number 26,815-A, which ended in a mistrial on November 28, 2017. (CR1: 77-80) Appellant filed a notice of appeal to the Eleventh Court of Appeals on December 5, 2017. (CR1: 82)

The Eleventh Court of Appeals in Eastland, Texas issued an opinion reversing the trial court on June 14, 2018. *Ex parte Adams*, No. 11-17-00332-CR, 2018 Tex. App. LEXIS 4372 (Tex. App.—Eastland June 14, 2018). No motion for rehearing was filed.

STATEMENT OF THE CASE

In *York v. State*, 342 S.W.3d 528, 552 fn. 155 (Tex. Crim. App. 2011), Judge Keller anticipated the question as to whether "double-jeopardy protection—via *Ashe's* 'ultimate fact' language—include[s] the

application of collateral estoppel to defenses[.]" This case presents such a question.

Appellant was indicted on two charges of aggravated assault with a deadly weapon for allegedly stabbing Joe Jeremy Romero in cause number 26,815-A and Justin Paul Romero in cause number 26,816-A, both alleged to have occurred on the same date. Appellant proceeded to trial in cause number 26,816-A. Appellant's jury charge contained an instruction on deadly force in defense of a third person pursuant to Tex. Penal Code Ann. § 9.33. Appellant was acquitted for the stabbing of Justin Romero.

Appellant then filed a pretrial writ of habeas corpus, arguing that the jury had found that he was acting in defense of a third person in his trial for the stabbing of Justin Romero and the State was collaterally estopped from re-litigating that issue. The trial court stated that the issue in the first trial was a legal justification for the stabbing of Justin Romero, and that issue had not been resolved as to the stabbing of Joe Romero. (RR2: 6) The trial court accordingly denied the application. (RR2: 6) Appellant proceeded to trial in cause number 26,815-A for the stabbing

of Joe Romero, which ended in a mistrial. (CR1: 77-80) Appellant then appealed the denial of his pretrial writ of habeas corpus. (CR1: 82)

The Eleventh Court of Appeals in Eastland, Texas issued an opinion reversing the trial court on June 14, 2018. *Ex Parte Adams*, No. 11-17-00332-CR, 2018 Tex. App. LEXIS 4372 (Tex. App.—Eastland June 14, 2018). No motion for rehearing was filed.

ISSUE PRESENTED

1. **When a defendant is acquitted on a defense of a third person theory after stabbing a person engaged in a fight with a friend, does the collateral estoppel component of the Double Jeopardy Clause as articulated in *Ashe v. Swenson* and this Court's opinions bar his subsequent prosecution for stabbing another person who was not fighting?**

STATEMENT OF FACTS

Brandon Joseph Adams (appellant) was indicted in cause number 26,815-A for aggravated assault with a deadly weapon against Joe Jeremy Romero. (CR1: 18) Appellant was also indicted in cause number 26,816-A for an aggravated assault with a deadly weapon against Justin Paul Romero. (DX: 1) Both offenses were alleged to have occurred on or about October 18, 2015. (CR1: 18) (DX: 1)

A jury trial commenced in cause number 26,816-A on September 18, 2017, which ended in appellant's acquittal. (DX: 1, 2, 3) Appellant filed a petition for writ of habeas corpus in the trial court in cause number 26, 815-A, alleging that the State was collaterally estopped from pursuing that charge by the Double Jeopardy Clause of the U.S. Constitution due to the acquittal in cause number 26,816-A. (CR1: 59-63) A hearing was set for November 27, 2017. (CR1: 64)

September 18, 2017 trial in cause number 26,816-A

At the November 27 hearing, appellant entered a transcript of the September 18 trial into evidence as defendant's exhibit 1. (DX: 1) (RR3: 1) At that trial, witness Alicia Graves testified that she used to date Joe Romero (a/k/a J.J.), who was the brother of Justin Romero. (RR3: 88) Graves testified that on the early morning of October 18 there was an altercation at her house between an acquaintance named Luke Hisey and Justin Romero. (RR3: 93) Luke Hisey and Justin Romero exchanged words, then began fighting and "rolling around on the ground." (RR3: 93-94) Joe Romero and appellant were also present; Graves testified that Joe Romero told appellant that "he needs to stay out of it" and at the same time told Justin Romero and Luke Hisey "[y]'all need to cut it out…it's

over." (RR3: 93) She testified that she heard Joe Romero tell appellant he "needs to back off" and tell Luke Hisey and Justin Romero that it's time to cut it out and "y'all are just going to wake up tomorrow and apologize." (RR3: 95) She testified that "[t]he next thing I see, I just see [appellant] over [Justin Romero] and then I hear someone yelling that there's a knife. And at this point [Justin Romero] comes out, he's bleeding, and then I go to call 9-1-1." (RR3: 95) She saw appellant stab Justin Romero several times in the back while he was on the ground fighting with Hisey and expressed surprise that Hisey did not get stabbed as well. (RR3: 97, 101) Joe Romero was also stabbed in the back or upper shoulder. (RR3: 96) She testified on cross-examination that appellant stabbed Joe Romero first, but that Joe Romero did not touch appellant. (RR3: 109)

Joe Romero also testified and stated that he was attempting to break up the fight between his brother and Luke Hisey. (RR3: 120-121) He said that he was telling the two of them "that's enough" and attempting to pull his brother when he felt "hot liquid" on him, which was from being stabbed. (RR3: 121) He said his brother and Hisey were rolling around up against the wall when he was stabbed and were still fighting. (RR3: 124) Justin Romero also testified that he and Hisey were

fighting, and that Joe Romero broke them up and stated "that's enough." (RR3: 181-182)

Luke Hisey testified that he was attacked by Justin Romero and knocked unconscious. (RR3: 222) Appellant testified that Justin Romero and Luke Hisey were on the ground, that Joe Romero was preventing him from walking to them, and that he was trying to break up the fight when Joe Romero hit him. (RR3: 238-239) Appellant said "Luke was just laying there getting his head turned. And about the time I got to him, like I said, Joe had hit me, and I kind of stepped back, and I started to panic. So I reached for my knife and then I seen Justin come at me, and I just started swinging, but I guess I hit Joe. I don't know how close he was." (RR3: 239) He said that he was "trying to protect myself and Luke…Luke was just down, and I didn't – these guys were both coming at me, and I just felt overwhelmed. I mean, he wouldn't stop pummeling Luke, so I was afraid they wouldn't be able to stop pummeling me either." (RR3: 242) Appellant admitted that he stabbed both Joe Romero and Justin Romero. (RR3: 241-242)

A jury charge was prepared that contained an instruction on deadly force in defense of another person: "You have heard evidence that, when

the defendant stabbed Justin Paul Romero, he believed his use of deadly force was necessary to defend Luke Hisey from what the defendant believed was Justin Paul Romero's use or attempted use of unlawful deadly force against Luke Hisey." (DX: 1) (RR3: 280) The application portions of the charge also discussed appellant's use of deadly force to protect Luke Hisey from Justin Romero. (DX: 7) (RR3: 282-283, 285-286) After deliberation, the jury found appellant not guilty. (RR3: 272)

Appellant subsequently filed an application for a writ of habeas corpus, arguing that collateral estoppel and the Double Jeopardy Clause barred appellant from being tried for aggravated assault with a deadly weapon for the stabbing of Joe Romero in cause number 26,815-A, as the jury decided the issue of defense of another person in favor of appellant. (CR1: 59-63) A hearing was held on November 27, 2017; appellant argued that the "only issue in the [prior] charge was the issue of defense of another" and that the two assaults were so intertwined that 26,815-A should be set aside. (RR2: 4-5) The State responded that "in the previous trial and in the Jury Charge that have now been received by the Court, the only question in here was whether or not Justin Paul Romero was threatening Luke Hisey, the third party, that [appellant] I believe to be

defending." (RR2: 5) The State further argued that while appellant had "already been tried for defense of a third party and acquitted on that, the State would afford this is a different victim….[w]e've got a different set of circumstances regarding this victim. He was not in a fight. There's no defending a third party. There's been no testimony." (RR2: 6) The trial court agreed that the issue in the first trial was a legal justification for the stabbing of Justin Romero, and that issue had not been resolved as to the stabbing of Joe Romero. (RR2: 6) The trial court accordingly denied the application. (RR2: 6) Following the hearing, trial in cause number 26,815-A took place, which ended in a mistrial. (CR1: 77-80)

SUMMARY OF THE ARGUMENT

Collateral estoppel under the Double Jeopardy Clause prohibits the relitigation of an ultimate issue of fact that has been determined by a valid and final judgment. In *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), the State was prohibited from bringing a second prosecution for a different victim when the issue was whether the defendant could be identified by witnesses as the assailant. That issue must necessarily have been decided in favor of the defendant in the first trial, and the State could not relitigate the issue in the second. In the instant case, appellant

did not deny that he stabbed Justin Moreno, but argued that he was justified in using deadly force against Justin Moreno in defense of Luke Hisey, who was in a fight with Justin Moreno. The jury was charged on the use of deadly force against Justin Moreno in defense of a third person, and acquitted appellant. However, the jury was not charged with and did not decide any such issue with respect to Joe Moreno. Because the jury made no finding on that issue, there is no bar to appellant's trial in cause number 26,816-A.

The court of appeals erred in identifying the ultimate fact under *Ashe* that the first jury was asked to decide; the jury was not merely asked to decide whether appellant was generally justified in using deadly force, but whether he reasonably believed that using deadly force was justified as to Justin Moreno. The first jury did not decide any issue with respect to Joe Moreno. In evaluating the trial court's denial of appellant's pretrial writ of habeas corpus, the court of appeals mistakenly weighed the mistrial which had not yet occurred and which is a legal nullity in any event. The court of appeals' reliance on this Court's opinion in *Ex parte Watkins,* 73 S.W.3d 264 (Tex. Crim. App. 2002) is misplaced. The State did not make the factual argument that the court of appeals states

that it made, and this Court did not reject the State's argument on that basis. Even if had that been the holding in *Watkins,* the State would argue that comparing a defendant's singular state of mind in determining "sudden passion" with the compound questions of whether appellant reasonably believed that deadly force was justified in stabbing two different people compares apples to oranges.

ARGUMENT

1. The issue before the jury in the second trial is whether the stabbing of Joe Romero in particular was justified, not merely whether deadly force was justified in general

Ordinarily, in reviewing a trial court's decision on a pretrial application for writ of habeas corpus, the appellate court reviews the facts in the light most favorable to the trial court's ruling and, absent an abuse of discretion, upholds the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). However, if the resolution of those ultimate questions turns on an application of legal standards, the court reviews the determination *de novo*. *See State v. Stevens,* 235 S.W.3d 736, 740 (Tex. Crim. App. 2007) (holding court of appeals erred in applying a deferential standard to trial court's ruling; *de novo* review of the trial

court's decision to apply collateral estoppel was appropriate under the facts of that case).

The Fifth Amendment of the United States Constitution protects an accused from a second prosecution after an acquittal or after a conviction for the same offense and multiple punishments for the same offense; embodied within the Fifth Amendment's guarantee against double jeopardy is the related doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral estoppel applies to facts necessarily decided in the first proceeding. *York v. State*, 342 S.W.3d 528, 539 (Tex. Crim. App. 2011) (citing *Murphy*, 239 S.W.3d at 795). Collateral estoppel, as embodied in the Fifth Amendment's guarantee against double jeopardy, is a matter of constitutional fact that must be decided through an examination of the entire record. *Ashe v. Swenson*, 397 U.S. at 442-44. To apply the doctrine of collateral estoppel, courts must first determine "whether the jury determined a specific fact, and if so, how broad—in terms of time, space and content—was the scope of its finding." *Watkins*, 73 S.W.3d at 268. Collateral estoppel bars relitigation of a discrete fact if that fact must necessarily have been decided in favor of the defendant in the first trial. *Watkins* at 268. As applied within a double-jeopardy

framework, collateral estoppel would prohibit the relitigation of an ultimate issue of fact that has been determined by a valid and final judgment. *Ashe* 397 U.S. at 443. Once determined, that issue cannot again be litigated between the same parties in any future lawsuit. *Id*.

This Court held that a court must determine (1) exactly what facts were necessarily decided in the first proceeding, and (2) whether those "necessarily decided" facts constitute essential elements of the offense in the second trial. *Murphy v. State*, 239 S.W.3d 791, 795 (Tex. Crim. App. 2007); *Ex parte Taylor*, 101 S.W.3d 434, 440 (Tex. Crim. App. 2002). "In each case, courts must review the entire trial record to determine—'with realism and rationality'—precisely what fact or combination of facts the jury necessarily decided and which will then bar their relitigation in a second criminal trial." *Taylor*, 101 S.W.3d at 441 (quoting *Ashe*, 397 U.S. at 444). The defendant must meet the burden of proving that the facts in issue were necessarily decided in the prior proceeding. *Murphy*, 239 S.W.3d at 795; *see also Guajardo v. State,* 109 S.W.3d 456, 460 (Tex. Crim. App. 2003) ("[t]he burden is 'on the defendant to demonstrate, by examination of the record of the first proceeding, that the [factual] issue

he seeks to foreclose was actually decided in the first proceeding.'") (quoting *Schiro v. Farley*, 510 U.S. 222, 232 (1994)).

Appellant relied on *Ashe v. Swenson*, 397 U.S. 436 (1970) for the proposition that the State is collaterally estopped by the Double Jeopardy Clause from trying him for the aggravated assault of Joe Romero. In *Ashe,* the defendant was charged with the robbery of six men in a poker game, and was tried and acquitted for the robbery of one of the six. *Id.* at 438-39. At issue was the defendant's identity and whether he could be positively identified as one of the robbers. *Id.* Six weeks later the defendant was tried again, and again the question of whether the witnesses could identify him as one of the robbers was at issue; however, this time he was convicted. *Id.* The U.S. Supreme Court held that the first jury had decided the issue of appellant's identification against the State, and the State was barred from relitigating that same issue with a different victim. *Id*. In short, the question that would be asked of the second jury was the exact question asked of the first.

In the U.S. Supreme Court's most recent decision regarding *Ashe,* Justice Gorsuch writing for the majority observed that "[b]ut whatever else may be said about Ashe, we have emphasized that its test is a

demanding one. *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial…A second trial 'is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question.' To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (quoting *Yeager v. United States*, 557 U.S. 110, 119-120, 127 (2009). (italics in *Currier*). This is an exacting standard.

Ashe does not bar relitigation here, as the issue decided against the State in the first trial is not the same issue that will be presented to the jury in the second. In the first trial, the evidence showed that Luke Hisey and Justin Romero were engaged in a fight, and appellant sought and received an instruction on the use of deadly force in defense of another person. That instruction dealt solely with whether appellant reasonably believed that deadly force was necessary to protect Luke Hisey from the

use or attempted use of unlawful deadly force by Justin Romero. (DX: 2) (RR3: 280-282) That issue was decided against the State. However, unlike *Ashe* the issue of appellant's identity was not disputed at that trial; appellant freely admitted that he stabbed both Justin Romero and Joe Romero. Whether appellant was justified in the use of deadly force against Justin Romero in defense of Luke Hisey will not be at issue in the second trial; rather, the issue for the jury to decide will be the wholly separate question of whether appellant was justified in the use of deadly force against Joe Romero, who was not fighting Hisey. The trial court recognized this in ruling: "I agree. I think the issue in the first trial was a legal justification for the stabbing of Justin Romero. And in this trial with Joe Romero being the victim, that issue has not been resolved." (RR2: 6) Because that question was not before the jury in the first trial it is not collaterally estopped, and appellant does not face double jeopardy by being tried for the stabbing of Joe Romero.

Respectfully, the opinion of the court of appeals misidentifies the "ultimate fact" that was necessarily decided by the jury in the first trial. The court of appeals stated that "the jury found that there was at least a reasonable doubt that Adams acted in defense of Hisey during the

altercation that involved both Justin and Joe." *Court's opinion at* 6. That is not what the jury was asked to decide, and it is not what the jury found. The jury was asked whether appellant reasonably believed using deadly force against Justin Romero was immediately necessary to protect Hisey. Likewise, the court of appeals' statement that in the second trial that "the ultimate issue would again be whether Adams was justified in using deadly force to protect Hisey" ignores that a jury could find that appellant's belief in the necessity of deadly force was reasonable as to the stabbing of Justin but unreasonable as to the stabbing of Joe. As the Court stated in *Murphy,* "[t]he first prong is fairly simple; the particular fact litigated in the first prosecution, in which a final judgment was entered, must be the exact fact at issue in the second prosecution." *Murphy* at 795. The court of appeals' opinion assumes that the fact at issue is whether appellant was acting in defense of another, but the exact fact that was litigated in the first case was whether appellant was reasonably acting in defense of another when he stabbed Justin, who was fighting his friend. Whether appellant was justified in stabbing an entirely different person who was not fighting is not the "exact fact" that was at issue in the first prosecution.

2. The court of appeals weighs the mistrial that occurred in evaluating the trial court's ruling, but that mistrial had not yet occurred and is a legal "nonevent"

The court of appeals notes at several points in its opinion that a jury could not reach a verdict after being charged on the question of whether deadly force was justified in the stabbing of Joe. The Court stated in a footnote that "Appellant was tried in the present cause in November 2017 for the aggravated assault of Joe; that trial resulted in a mistrial, with eleven jurors voting 'not guilty.'" *Court's opinion at 5.* The Court further found that the mistrial was relevant in determining what the "ultimate issue" of fact under *Ashe* would be in a subsequent trial, saying "[d]efense of a third person would again be an ultimate issue of fact in the State's prosecution of Adams for stabbing Joe—as reflected by the previous trial that resulted in a mistrial." *Court's opinion at 6.* The State would first assert that the mistrial has no place in evaluating the trial court's ruling on appellant's writ. Even were a mistrial relevant, the court's pretrial ruling on appellant's writ of habeas corpus occurred before the mistrial. Moreover, the U.S. Supreme Court stated in *Yeager v.*

United States, 557 U.S. 110, 120 (2009) that a mistrial is a "nonevent" for purposes of evaluating double jeopardy under *Ashe*:

> The Court of Appeals' issue-preclusion analysis was in error. A hung count is not a "relevant" part of the "record of [the] prior proceeding." *See Ashe*, 397 U.S., at 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (internal quotation marks omitted). Because a jury speaks only through its verdict, its failure to reach a verdict cannot – by negative implication – yield a piece of information that helps put together the trial puzzle. A mistried count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry…[u]nlike the pleadings, the jury charge, or the evidence introduced by the parties, there is no way to decipher what a hung count represents. Even in the usual sense of 'relevance,' a hung count hardly 'make[s] the existence of any fact…more probable or less probable." Fed. Rule Evid. 401. A host of reasons – sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few – could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.

Yeagar, 557 U.S. at 111-12. It must be said that in *Yeagar,* the Court was rejecting the prosecution's argument that the jury's unanimous verdict in one count should act as a bar to collateral estoppel as to the hung counts, but the State would assert that the same logic applies here: a hung jury is

a nonevent that should play no part in evaluating the application of collateral estoppel under *Ashe.*

3. The court of appeals misconstrues this Court's holding in Ex Parte Watkins, and Watkins would not apply here even had that been the holding

The Eastland Court further errs in comparing the two defensive questions to the single question of the defendant's state of mind in *Ex Parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002). However, in *Watkins,* the State made an entirely different argument than the one presented here. The State in *Watkins* did not argue that the facts in that particular case precluded relitigation, but argued instead that collateral estoppel does not apply to punishment at all:

> [T]he State did not claim that, even if the doctrine of collateral estoppel does apply to the issue of "sudden passion," these particular facts in this particular case nonetheless do not give rise to a collateral estoppel bar. Thus, we are not called upon to decide whether a rational trier of fact could have found that appellant's "sudden passion" state of mind at the time he murdered his wife was or could be different at the time he shot Keith Fontenot. Instead, the State, relying primarily upon the Supreme Court's decision in *Monge v. California*, argues that the doctrine of collateral estoppel simply does not apply to any punishment fact or issue, period.

Watkins, 73 S.W.3d at 268-70. The Court found that collateral estoppel barred the state from relitigating the issue of sudden passion in the second shooting "because the jury in the first trial found that appellant acted under 'sudden passion' in murdering his wife and because the State did not claim, or indicate any evidence to show, that a rational jury could conclude that appellant's state of mind changed in the five minutes between the two shootings." *Id.* at 275. In other words, the State in *Watkins* did not argue that a rational jury could have found from the evidence presented that the defendant acted in sudden passion in one shooting and not the other, but rather that collateral estoppel simply did not apply in punishment. In the instant case, the State is making the very argument that the Court noted was not made in *Watkins*: that a rational jury could reach a different conclusion as to the second victim in the second trial.

Moreover, even had the State made that argument in *Watkins,* it would nonetheless not serve as a bar in the instant case. In *Watkins,* the question as to whether the defendant acted in "sudden passion" in the attempted murder of his wife's lover had already been decided adversely to the State in the prior trial for the murder of his wife. *Id.* at 265-66, 275.

The State did not present any evidence that the defendant's state of mind had changed in the five minutes between the first shooting and the second shooting. *Id.* at 275. This is because the defendant's state of mind when acting in "sudden passion" is singular and unchanging; it is what it is and cannot be reasonable as to one person and unreasonable as to the next, absent the passage of time required to regain the capacity for cool reflection. *See McKinney v. State,* 179 S.W.3d 565, 569 (Tex. Crim. App. 2005); Tex. Penal Code Ann. § 19.02. "Sudden passion" does not hinge on the reasonableness of the defendant at all. On the contrary, by its very nature "sudden passion" requires a showing that adequate provocation rendered a defendant's mind incapable of cool reflection. *McKinney,* 179 S.W.3d at 569. This is unlike self-defense or defense of a third person, which require a reasonable reaction to the perceived threat. That reaction may be reasonable as to one person and unreasonable to another, regardless of how much time has passed. A defendant claiming that he stabbed two different people to protect a third may be reasonable in his belief that deadly force is justified in one stabbing and unreasonable in his belief that the second is justified. The court of appeals' interpretation and application of *Watkins* may have held true had appellant's defense

been insanity rather than defense of a third person, as appellant's state of mind could be expected to have been the same as regards both stabbings, but appellant's perception of whether deadly force was reasonably necessary as to two different people presents two different issues. A rational jury could find that deadly force was justified in one stabbing and unjustified in the other.

Conclusion

The court of appeals' error is in treating the two questions of whether appellant was legally justified in stabbing two different and differently situated people the same as the singular question of the robber's identity in *Ashe.* In *Ashe,* the question of whether the defendant was the same person that robbed the victims was precisely the same issue in both trials. In the instant case, appellant claimed defense of a third person after he stabbed two different people; one was engaged in a fistfight with his friend according to all witnesses present, and one was described as a bystander by at least some witnesses. No witness testified that they saw Joe Romero strike Luke Hisey, and to treat the two stabbings as one and the same is simply wrong.

PRAYER FOR RELIEF

The State respectfully requests that this Court reverse the judgment of the Eleventh Court of Appeals regarding appellant's sole issue and remand to the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above brief is in compliance with the Rules of Appellate Procedure. The font size in the brief is 14 point, except for footnotes which are 12 point. The word count is 4760, excluding the exceptions listed in Rule 9.4. The word count of the entire brief is 5720.

/s/ Britt Lindsey
Britt Lindsey

CERTIFICATE OF SERVICE

I certify that on this 29th day of October, 2018, a true copy of the foregoing State's Brief on the Merits was served on the parties according to the requirements of law by email or efiling to:

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